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# In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 33

LOCAL UNION NO. 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and the following, as individuals and representatives of said Local Union No. 25 of Boston, Massachusetts: EDWARD F. JENKINS, MICHAEL J. NORTON and WILLIAM J. McCARTHY,

*Petitioners,*

*v.*

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

*Respondent.*

## ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

## BRIEF FOR PETITIONERS

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OCTOBER TERM, 1955

No. 33

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THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

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## ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

## BRIEF FOR PETITIONERS

### Opinion Below

The opinion of the Supreme Judicial Court of Massachusetts entered on November 17, 1954 (R. p. 303) is reported in 1954 Massachusetts Advance Sheets 827 (331 Mass. 720), 122 N.E.2d 759.

## Jurisdiction

The jurisdiction of this Court is invoked on the ground that the highest court of Massachusetts in which a decision could be had has affirmed a permanent injunction (R. p. 301) which invades the area of labor relations law preempted and occupied by, and conflicts with, the provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. 141, *et seq.*). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

The rescript of the Supreme Judicial Court of Massachusetts (R. p. 302) was entered November 17, 1954. It ordered to be modified, and as modified, affirmed a final decree (R. p. 301) of the Superior Court. The Superior Court entered a final decree after rescript (R. p. 317) March 4, 1955. The petition for certiorari was filed February 11, 1955, before the entry of the final decree after rescript, since an application for review, to be timely, must be filed within ninety days of the date of the rescript of the Supreme Judicial Court. *Cole v. Violette*, 319 U.S. 581. The writ of certiorari was granted March 28, 1955 (R. p. 318, 348 U.S. 969).

## Constitutional and Statutory Provisions Involved

The pertinent provisions of the Constitution of the United States (Article I, Section 8, and Article VI, Clause 2) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. 141, *et seq.*) are set forth in the Appendix, *post*.

## Question Presented

Does the Labor Management Relations Act oust State courts of jurisdiction of a suit by a railroad to enjoin a

union and union representatives from engaging in peaceably conducted strikes or attempts to induce such strikes by the employees of interstate motor carriers for the purpose of persuading such carriers to agree to restrict their use of interstate railroad transportation facilities and to give some portion of such interstate carriage work to their employees who are all represented by the union?

## Statement of the Case

The respondent Railroad Company is a common carrier by rail, subject to the Interstate Commerce Act and to the Railway Labor Act.[1] Since about 1937, its operations have included that of hauling on flat cars loaded trailers of the type ordinarily hauled over the highways by motor trucks. This operation is known in the trade and popularly as "piggy-backing." This operation is carried on between Boston and New York, between Providence and New York, between Boston and New Haven, between Springfield (Massachusetts) and New York, and at times from New Haven to New York. (R. p. 52).

The petitioner Union is the collective bargaining representative of drivers and helpers employed by motor carriers in the Boston area, and has collective bargaining agreements with motor carriers who operate out of the Boston area. (R. p. 120). The Union does not represent any of the employees of the respondent Railroad. (R. p. 121). The individual petitioners are officers and business agents of the petitioner Union who were joined as defendants below.

The process of "piggy-backing" in the Boston area is accomplished by having loaded trailers, owned by the motor

[1] It is, thus, not an "employer" within the literal definition of Section 2(2) of the Labor Management Relations Act, although it may be a "person" within the definition of Section 2(1).

carriers, delivered by motor trucks, operated by employees of the carriers, at a freight yard of the respondent. There the trailers are driven, by mechanical devices, by employees of New England Transportation Co. on to specially designed flat cars of the respondent. The trailers are then lashed and secured to the flat cars by employees of the respondent, and are carried, by trains of the respondent, to New York and the other points mentioned above.

New England Transportation Co. is a subsidiary of the respondent. It is a motor carrier, whose employees are members of the petitioner Union, and it has a collective bargaining agreement with the Union similar to the agreements between the Union and other motor carriers in the Boston area.[2]

For some years the petitioner Union had been disturbed about "piggy-backing" because it felt that the practice diminished the opportunities of its members for employment in over-the-road hauling of trailers between Boston and New Haven and between Boston and New York. During the negotiation of collective bargaining agreements with the motor carriers in 1946, and again in 1949, the Union made formal demands that the carriers cease to ship any trailers by "piggy-back" and carry all their freight over the road. These demands were refused, and the contracts, when made, did not contain agreements in the terms demanded by the Union. (R. pp. 123-126, 191-193). After the contracts were made, in 1946, and in 1949, informal dis-

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[2] The opinion below (1954 Mass. Adv. Sh. at 830, R. p. 306) states: "The New England Transportation Co., a corporation, hereinafter called New England, is a 'subsidiary' of the railroad. Nothing more definite of its relationship to the railroad appears." The opinion does not advert to the evidence that New England is a motor carrier (R. pp. 143, 144, 159, 166, 277) nor to the statement in the record (R. p. 30) that New England is subject to the jurisdiction of the National Labor Relations Board. (See, *New England Transportation Co.*, 1 NLRB 130).

cussions and negotiations continued between the Union and the carriers with respect to the discontinuance, by the carriers, of the practice of "piggy-backing," or, in the alternative, a reduction of the volume of "piggy-backing" so as to bring about an increase of the volume of over-the-road trucking. (R. pp. 138-143, 157-158, 195-206, 248, 260, 263). These negotiations and discussions did not result in any formal agreement between the Union and the carriers.

There were also negotiations and discussions over the issue whether the use, by carriers, of "piggy-backing" constituted violation of the contract provision which restricted the carriers in the leasing of "other equipment" when they have available equipment of their own. (R. pp. 126-128, 161-165).

Petitioners Norton and McCarthy, as business agents of the Union, had been assigned to "cover" that part of the City of Boston which includes Yard 5 of the respondent Railroad, where the respondent receives trailers to be carried in its "piggy-back" operations. On July 11, 12 and 14, 1952, these petitioners, standing near Yard 5,[3] stopped a number of truck-drawn trailers owned by carriers with whom the Union had collective bargaining agreements and bound for Yard 5 to be placed on flat cars for "piggy-back" transportation, and by word and signal persuaded the drivers not to deliver the trailers at Yard 5, but to turn back. (R. pp. 54, 64, 77, 83, 160). They also persuaded the employees of New England Transportation Co. working at Yard 5 not to load the trailers of these carriers on to flat cars for "piggy-back" transportation. (R. pp. 72, 79, 82, 84).[4]

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[3] On one occasion, for a brief interval of time, one of the petitioners walked on to the respondent's premises. (R. p. 105). This technical trespass was not relied upon by counsel in argument, nor was it considered significant by either of the courts below.

[4] There is no evidence in the record nor has there been any assertion of persuasion or coercion addressed to employees of the respondent,

On July 15, 1952, the respondent filed a bill in equity (R. p. 1) against the petitioners, seeking injunctive relief and damages. The Court, *ex parte*, issued a restraining order (R. p. 5) granting the first two prayers of the bill (R. pp. 4, 5) and forbidding the petitioners to induce, threaten or hinder any person from delivering trailers to the respondent; or to picket or patrol the premises of the respondent "or in any other way to interfere with or prevent the loading or unloading of freight of any kind or nature or description from or to semi-trailers, flat cars, box cars or other transportation equipment used and employed by the plaintiff."

The following day, July 15, 1952, the petitioners moved for dissolution of the temporary restraining order, (R. p. 6). A hearing on this motion and on the continuance of the restraining order was held and evidence taken on July 24 and 25, 1952 (R. pp. 20-170). On July 30, 1952, the Court "found and ruled" that it had jurisdiction of the case and ordered the injunction continued in force until otherwise ordered. (R. p. 6). On August 4, 1952, the petitioners moved for modification and amendment of the restraining order and injunction, and on August 8, 1952 this motion was denied. (R. p. 7).

On August 8, 1952, the trial Court reported to a single justice of the Supreme Judicial Court the material facts (R. p. 7) upon which it based its denial of the motion to dissolve the preliminary injunction and a report of questions of law (R. p. 173) including the question, "Does this court have jurisdiction of the action?" On September 30, 1952, after argument, the single justice of the Supreme Judicial Court affirmed the order of the Superior Court,

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nor of any strike activity on their part. The Court below expressly states (1954 Mass. Adv. Sh. at 835, R. p. 311): "All parties agree that there was no dispute between the railroad and the union."

"which is in essence and substance an interlocutory decree of preliminary injunction." (R. p. 174).

Meanwhile, on July 25, 1952 the Court had allowed (R. p. 10) a motion for leave to file a substitute bill of complaint (R. p. 10). Subsequently, on January 15, 1953 the respondent moved (R. p. 175) to file an amended substitute bill (R. p. 176). This was allowed on January 23, 1953. (R. p. 184). On January 26, 1953, the petitioners filed a demurrer and an answer (R. p. 184) to the amended substitute bill. On March 2, 1953, the demurrer was overruled. (R. p. 188).

The petitioners duly took interlocutory appeals from or exceptions to the various adverse rulings of the Court. (R. pp. 19, 175, 188).

On March 2, 1953 the final hearing was had and further evidence taken (R. pp. 189-296) it being stipulated (R. p. 189) that the evidence taken at the earlier hearing be made a part of the record.

On March 16, 1953 the petitioners filed and the Court denied requests for rulings of law (R. p. 296), and the Court made a report of material facts and an order for a decree. (R. p. 298). On March 26, 1953 the Court entered its final decree (R. p. 301), enjoining the petitioners as in the preliminary injunction and awarding damages against them. On April 14, 1953 the petitioners filed their appeal from the final decree and from the denial of the request for rulings of law. (R. p. 301). The appeals were heard in the Supreme Judicial Court February 2, 1954, and on November 17, 1954 that Court issued its rescript (R. p. 302) affirming the injunctive portion of the decree, and modifying the assessment of damages so that it would run against the petitioners, Norton and McCarthy, instead of against the petitioners generally. The Court also filed an opinion. (R. p. 303). In compliance with the rescript, the Superior Court on March 4, 1955 entered another final decree. (R.

p. 317). This decree is now being reviewed by this Court on the writ of certiorari entered on March 28, 1955 (R. p. 318).

## Summary of Argument

### I.

The activity of the Union business agents in inducing employees of various motor carriers to refuse to deliver trailers to the Railroad for transportation on flat cars, and the activity of various members of the Union, employees of the motor carriers, in refusing to deliver such trailers for such purpose, were not secondary activities directed against the Railroad. There was no dispute between the Union or any of its members and the Railroad, nor were any attempts made to encourage or induce employees of the Railroad to do or refrain from doing anything. On the contrary, the activity of which the Railroad has complained was primary activity directed against motor carriers (not parties to this suit) with whom the Union had had a long-standing dispute with reference to "piggy-backing," for the purpose of inducing the motor carriers to accede to the Union's desire to have more trailers transported over the road, so as to assure employment to drivers who were members of the Union. *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665, 671; *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 686. This activity of the Union, carried on as it was continuously, for three days until it was enjoined, was "concerted activity for the purpose of collective bargaining or other mutual aid or protection," within the meaning of Section 7 of the Taft-Hartley Act. The activity itself was at all times orderly and peaceable, and the objective of the Union was within the area as to which Congress has guaranteed the right to bargain and engage in other

concerted activities. This is borne out not only by the legislative history of the Taft-Hartley Act, but also by Labor Board and court decisions marking the outlines of the categories of objectives for which organized employees have the right to bargain or bring collective sanctions to bear. In this light, the legality or the illegality of the Union's conduct is not subject to determination by standards contained in state law. *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 390; *Automobile Workers* v. *O'Brien*, 339 U.S. 454. This is particularly so where, as here, the complained-of activities are carried on in commerce itself, not merely in a local industry affecting commerce. The Court below, therefore, erred in enjoining the activities in question as an unlawful boycott under Massachusetts law, because that law, however applicable it might otherwise be to the conduct of the petitioners, has been superseded by the inconsistent provisions of Section 7 of the Taft-Hartley Act.

## II.

The State Court erred in taking and retaining jurisdiction of this suit because, even if the subject matter were not clearly protected activity within the coverage of Section 7 of the Taft-Hartley Act, that question would be in a reasonably debatable area, and, in the alternative, any claim made against the Union on the facts of this case would be at least colorably within the exclusive primary jurisdiction of the National Labor Relations Board to determine under Section 10 of the Act. In either event, the State Court had no jurisdiction, particularly under a state *labor law*. *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468; *Garner* v. *Teamsters Union*, 346 U.S. 485. The successive amendments to the Railroad's bill of complaint show on their face this jurisdictional defect by revealing

that the Railroad's theory of the case was that the Union's activity was, in part, one or more unfair labor practices under Section 8(b) of the Labor Management Relations Act.

It makes no difference under this heading that the plaintiff here is a railroad. The jurisdiction of the Board is exclusive, regardless of distinctions advanced between "public" and "private" rights. *Garner* v. *Teamsters Union*, supra. And see *General Drivers, etc.* v. *American Tobacco Company, Inc.*, 348 U.S. 978. In any event, the Court below was unwarranted in concluding that the Railroad could not raise issues of unfair labor practices before the Board because the Board would not entertain charges filed by a railroad. The authorities cited by the Court do not support this conclusion, and no case has been found in which the Board reached such a result. Consequently, the Railroad's failure to seek relief from the Board brings this case within the doctrine of *Building Trades Council* v. *Kinard Construction Co.*, 346 U.S. 933.

## Argument

### I. Petitioners' Activities Were Authorized by Section 7 of the Labor Management Relations Act, 1947.

Section 7 of the Labor Management Relations Act recognizes and declares, as did its predecessor, the National Labor Relations Act, the right of employees "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *". Whether specific collective employee activity constitutes an exercise of the rights thus guaranteed depends principally upon the objective of the activity and the means used to achieve the objective. It is submitted

that on both scores the activity of the petitioners in the present case comes within the protection of the Statute.

The record amply establishes that the objective of the petitioners was to persuade the motor carrier employers to restrict their use of trailer-on-flat-car facilities of the Railroad, and to give at least some portion of such interstate carriage work to their employees, who are all represented by the Union. (R. pp. 138-143, 157-158, 195-206, 248, 260, 263). This, it is submitted, is a proper bargaining objective and subject matter under Section 7.

This Court, the lower federal courts and the Labor Board, in giving concrete meaning to Section 7, have built up a body of precedent which indicates the sort of thing which constitutes a bargainable subject matter within the coverage of Section 7. It would be manifestly impossible to construct a comprehensive catalog of such matters, but it is abundantly clear that the category of bargainable objectives extends far beyond the rudimentary "wages and hours," and reaches well into the area which an older economy would classify as, on the one hand, "employer prerogative," or, on the other, "internal affairs of the union."

Among the subject matters as to which bargaining has been held to be proper, or even compellable are: inclusion of a "management functions" clause in an agreement (*NLRB* v. *American National Ins. Co.*, 343 U.S. 395); the assignment of employees to shifts (*Bus Employees* v. *Wisconsin Board*, 340 U.S. 383); inclusion of a "strike vote" clause in an agreement (*Allis-Chalmers Mfg. Co.* v. *NLRB*, 213 F.2d 374, C.A. 7); change of status from "driver-owner" of trucks to salaried employee (*NLRB* v. *Na-Car Carriers*, 189 F.2d 756, C.A. 3); an employee stock purchase plan (*Richfield Oil Corp.*, 110 NLRB No. 54; 34 LRRM 1658); placement of employees upon relocation of plant (*Brown Truck & Trailer Mfg. Co.*, 106 NLRB 999); em-

ployees manual, subcontracting of work, and working schedules of employees (*Timken Roller Bearing Co.*, 70 NLRB 500). See also, Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 397; Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297, 1328.

It is submitted that the objective of gaining a higher ratio of transportation work for over-the-road shipment so as to obtain more widespread employment of Union drivers was of the same generic character as the objectives enumerated above, and was equally for "mutual aid and protection" within the meaning of Section 7.

The bargainable character of the Union's objective was more than abstract theory. In the case of the petitioner Union and the truck operators with whom it had dealings, it was an accomplished fact. Although the operators had not agreed to the union proposal for complete elimination of "piggy-backing" (R. p. 126), there were conferences between union agents and truck operators, after collective bargaining agreements had been made, with respect to the amount of freight which should be shipped over the road, and the amount which might be shipped by railroad flat-car. The witness Rosenberg, manager of the Holland Transportation Company, when called by the Railroad, testified that he had initiated a conference with the Union's business agents before equipping some of his trailers for flat-car transportation and had reached an understanding with them as to the use of available road drivers and equipment before shipping by rail. (R. pp. 247-248). The witness Weiner, operations manager of St. Johnsbury Trucking Company, also called by the Railroad, testified to an understanding he reached with other Union business agents that he would limit his use of rail facilities to "overflow" business, i.e., freight remaining to be shipped after the available drivers had been given work. (R. p. 260). It was

stipulated at the trial that six other representatives of trucking companies who had been subpoenaed by the Railroad would testify to the same effect as had Weiner. (R. p. 268).

The Court below seems to have no quarrel with the legitimacy of the Union's objective as thus stated. The opinion (R. p. 305) describes the conduct of the business agents of the Union which was the basis of the injunction as follows:

> "The relations between the motor carriers and the union concerning this mode of transportation had become unsteady and strained, but all parties were seemingly reluctant to force the issue. Finally on the late afternoons of July 11, 12, and 14, 1952, the defendants McCarthy and Norton, business agents of the union, took positions on the street near the entrance to the plaintiff's freight yard, stopped various tractors hauling trailers belonging to motor carriers who had collective bargaining agreements with the union, and ordered them to drive away from the freight yard, which the operators did. Some of the trailers of these motor carriers were already in the freight yard when McCarthy and Norton appeared, and were ready for loading, but they were not loaded because of the orders given by McCarthy and Norton to the employees of New England Transportation Co. These two union representatives were in the freight yard on one of these afternoons for a short period of time carrying out their purpose of preventing the rail transportation of the trailers. Their conduct at no time was disorderly or other than peaceful. Although it did not appear that McCarthy and Norton were acting under any direct or specific instructions from the union, the union seeks to justify their conduct on the

ground that they were acting in its behalf in attempting to make more work available for its membership if the rail transportation was prevented or restricted. The motor carriers are not parties to this suit."

On these facts, however, the Court concluded that the conduct was tortious because, under Massachusetts law, it constituted a secondary boycott against either the Railroad or its subsidiary *motor carrier*, New England Transportation Company. Said the Court: "* * * the right to picket at the entrance to the plaintiff's freight yard fails when it is utilized as a means of maintaining an unlawful secondary boycott." (R. p. 313). Again, "* * * the union had no right to bring pressure upon the railroad through New England to compel the railroad to cease transporting trailers for the motor carriers." (R. p. 312). Again, "The union could not accomplish such an object against the motor carriers by means of a secondary boycott against New England or the railroad." (R. p. 312).

It is, of course, a commonplace that the content and meaning of state law, once established by a state court of last resort, are beyond review by this Court or any other. What the Court below overlooked was that, before it could properly reach the issue of a secondary boycott under state law, it must dispose of the Union's contention that the conduct in question is within the protection of Section 7 of the Labor Management Relations Act.[5] This the Court below failed to do.

Even if it should be suggested that the State Court's conclusion that the Union's activity constituted a secondary boycott is in the nature of a finding of fact, that would not bar inquiry by this Court into the question whether it is

[5] This contention was adequately and timely made. See Petition for Certiorari, No. 536, October Term, 1954; pp. 8, 9.

not, rather, protected activity under federal law. As Mr. Chief Justice Taft once said:

> "In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here." *Truax* v. *Corrigan*, 257 U.S. 312, 324.

It is the contention of the Union that, so far as "secondary boycott" concepts are determinative of the case, its conduct must be appraised by the so-called "secondary boycott" standards of the Taft-Hartley Act, and, if it is not a secondary boycott by those standards, it should be held to be protected activity under Section 7. As this Court said in *Garner* v. *Teamsters Union*, 346 U.S. 485, 499:

> "The detailed prescription of a procedure for restraint of specific types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to infringe on the

area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by means which the federal act prohibits." Reiterated in *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468, 475.

The work stoppage which the petitioners induced, far from being secondary, was in direct and primary aid of the objective of increasing the volume of over-the-road shipment to make more work available to the Union membership. The stoppage involved only those employees who were represented by the Union and who were directly interested in the work loss occasioned or threatened to them by the practice of "piggy-backing." Trailers of shippers or employers with whom the Union had no contracts were allowed to be shipped by flat car on the days in question (R. p. 159). There was no purpose or attempt to enlist or obtain the sympathetic action of any other employees.

Under standards authoritatively determined to be contained in the Labor Management Relations Act, the conduct of the Union could not be ruled to be a "secondary boycott." The Court below agreed (R. p. 311) that "there was no dispute between the railroad and the union." This, alone, would be practically conclusive that the Union's conduct was not "secondary" by federal standards. See, *NLRB* v. *Denver Building & Construction Trades Council*, 841 U.S. 675, 687; *Electrical Workers* v. *NLRB*, 341 U.S. 694; *Carpenters Union* v. *NLRB*, 341 U.S. 707; *In re Sailors Union of the Pacific and Moore Dry Dock Company*, 92 NLRB 547; *Thurston Motor Lines, Inc.*, 110 NLRB No. 122, 35 LRRM 1112. In these cases Taft-Hartley "secondary boycotts" were found to be involved where work stoppages were induced in order to reach back against a party with whom the union was in dispute, or where there was persuasion of employees of another employer.

Here, not only was there, as the Court found, no dispute between the Union and the Railroad, but the record is barren of any Union inducement or persuasion of employees of the Railroad. Compare, *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665, *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468, 478.

In the light of these considerations, it is submitted that the activity of the petitioners was the inducement of a primary work stoppage in aid of bargainable demands. As such, it came within the freedom of concerted activities guaranteed by Section 7, and whatever might be the standards of Massachusetts law with respect to secondary boycotts, they are irrelevant. *Auto Workers* v. *O'Brien*, 339 U.S. 454; *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383; *Garner* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468.

Nor did the Union's primary activity cease to be such because there was economic loss resulting to the Railroad. As was said by an earlier Massachusetts Court in a classic case, "* * * the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of the acts:" *Pickett* v. *Walsh*, 192 Mass. 572, 584-585.

Nor is there merit in the suggestion of the Court below (R. p. 313) amplified by the Respondent in its Brief in Opposition to the Petition for Writ of Certiorari, p. 10, that the locale of the Union's activity made it something other than primary. The Taft-Hartley test as to whether concerted labor activity is primary or secondary is a functional not a mechanical one. *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665. In the circumstances of this case, the activity of the Union had no effect on the Railroad greater in kind or degree than would have been the case if the Union, with the same objective, had induced the drivers not to leave their respective motor carrier

terminals with "piggy-back" loads, and persuaded the employees of New England Transportation Co. not to load delivered trailers, thus preventing the Railroad from transporting the trailers.

Wherever the Union activity took place, whether at the motor terminals or at the railroad freight yard, the economic effect upon the Railroad would have been the same. The significant fact is that neither the Railroad nor its employees were enlisted or conscripted in aid of the only existing dispute, namely, that between the Union and the motor carrier employers. The area of the existing dispute was in no way enlarged by the fact that the Union chose, as a matter of convenience, to induce the truck drivers to turn back at the entrance to the freight yard, rather than to stop at the exits of the various truck terminals. Nor was the inducement of the New England Transportation Co. employees not to load delivered trailers other than a primary strike pressure, since, although New England is a subsidiary of the Railroad, it is a motor carrier employer whose employees were represented by the Union.

The opinion below states (R. p. 310): "Neither the railroad nor New England was a party to any controversy between the union and the motor carriers. There was no dispute between New England and its employees as to wages, hours, or working conditions. It is plain that pressure was brought upon the employees of New England solely for the purpose of preventing the transportation of the trailers by the railroad or, in other words, to compel the railroad to cease doing business with the motor carriers. This was the maintenance of a secondary boycott against the railroad * * *"

Both the premise and the conclusion, it is submitted, are erroneous. New England is in the trucking business (R. p. 143) and, as the Court found in another part of its opinion (R. p. 306) it has a collective bargaining agreement

with the Union. In addition to loading trailers on flat cars at the Railroad's freight yard, it also maintains an over-the-road freight service between Boston and New York. (R. pp. 166-167). Thus, there was as much dispute between New England and its employees as there was between any other trucker in the area and its employees over the extent of the practice of "piggy-backing" freight. The work stoppage by the New England employees was no more secondary than that of the employees of other truckers who refused to deliver trailers at the Railroad yard for flat-car transportation. It was all primary activity calculated to achieve the Union's objective of obtaining from the truckers a larger share of their transportation business for over-the-road drivers.

In cases involving such an issue as is here presented, viz., whether the provisions of the Taft-Hartley Act supersede state laws or oust state courts of jurisdiction of labor disputes, this Court has frequently looked for guidance to the legislative history of that Act. *Allen Bradley Local No. 1111* v. *Wisconsin Board*, 315 U.S. 740, 748, n. 7; *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 458, n. 5; *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 392, 393, 395; *International Union* v. *Wisconsin Board*, 336 U.S. 245, 260; *Algoma Plywood & Veneer Co.* v. *Wisconsin Board*, 336 U.S. 301, 307-313; *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 668. It is submitted that reference to the legislative history here will lend strength to the Union's contention that its conduct falls within the protection of Section 7, and is insulated from the injunctive jurisdiction of state courts.

The initial legislative step towards the enactment of the Labor Management Relations Act, 1947 was the so-called Hartley Bill, H.R. 3020, 80th Congress, 1st Session. This bill, as it passed the House, contained a number of provisions which, had they become law, would have prohibited

the very things which the Massachusetts decree now under review undertakes to prohibit, and would have set up procedural sanctions under which the prohibitions could have been enforced. These provisions of the bill are set forth in the appendix.

Thus the bill, in Section 2(11) would have removed from the area of bargainable disputes or subject matters, a dispute to gain additional work for the employees. Section 2(14) would have made it an "illegal boycott" for employees in concert to refuse to handle or transport articles "by reason of the character of a prior or proposed future handling thereof." Section 7(a) expressly would have limited the right of "concerted activity" to objectives enumerated in Section 2(11), and Section 8(b)(3) would have made it an unfair labor practice to strike for an objective which is not bargainable under Section 2(11). Section 12(a)(3)(A) would have made an "illegal boycott" an "unlawful concerted activity", for which Section 12(b) provided a damage action in the federal courts. Section 12(c) removed the protection of the Norris-LaGuardia Act, and Section 12(d) would have subjected persons engaging in such activities to deprivation of rights under the bill. Section 301 would have subjected those who engage in "unlawful concerted activity" to the antitrust laws, and in this connection, too, would deny them the benefits of the Norris-LaGuardia Act.

It will be seen that these sections of the Hartley Bill, if enacted into law, would have described precisely the things which the petitioners in this case have done. Their objective of obtaining more work from the trucking operators would have been illegal, their refusal to deliver trailers for "piggy backing" would have been an illegal boycott, and the work stoppage in aid of their objective would have been an "unlawful concerted activity", for which they would have been subject to a federal injunction and damage

judgment, guilty of an unfair labor practice and liable to the civil and criminal provisions of the antitrust laws.

After the Hartley Bill passed the House, however, the Senate Committee on Labor and Public Welfare reported out S. 1126 which ultimately, in substance, was passed as a substitute for the Hartley Bill. In conference, the Bill as it passed the Senate was adopted practically in its entirety, both houses accepted the conference report, and what ultimately became the statute was virtually the Senate bill. The Act, in its final form, eliminated all of the provisions of the Hartley Bill enumerated above.

It is submitted that this sketch of legislative history shows clearly that the Congress gave explicit attention to a proposal to exclude conduct such as that of the present petitioners from the protection of Section 7 and to make it subject to the sanctions of the Labor Board in the public interest and the basis of judicial suits by private parties whose interests might be adversely affected. The rejection of the proposal, after consideration by both houses, can lead only to the conclusion that Congress decided that such conduct is of the sort which the national policy set forth in Section 7 classifies as protected.

There is no legitimate room, here, for the argument that the failure of Congress to declare that such conduct is within Section 7 as explicitly as the Hartley Bill declared that it was not, makes the conduct of the petitioners fair game for state regulation. The only instances in which this Court has recognized state jurisdiction as against a claim of federally recognized privilege under Section 7 are those where there has been an express disclaimer by Congress of a purpose to regulate (*Algoma Plywood & Veneer Co.* v. *Wisconsin Board*, 336 U.S. 301), a pattern of violence, where there is naturally the strongest of presumptions that the state police power is left intact (*Allen-Bradley Local No. 1111* v. *Wisconsin Board*, 315 U.S. 740;

*United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656), or harrassing tactics unrelated to bargaining proposals, where there is clearly no Section 7 objective (*International Union* v. *Wisconsin Board*, 336 U.S. 245). This Court has shown little disposition to countenance further extension of state police power which impinges upon activities in the field of labor relations as to which there is a claim of federal right, even though it be in the guise of a non-labor law. *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468. *A fortiori*, it should frown upon attempts to adjudicate claims of federal right under state *labor laws*. *Garner* v. *Teamsters Union*, 346 U.S. 485.

In *American Federation of Labor* v. *Swing*, 312 U.S. 321, 326, this Court found that under the Fourteenth Amendment, "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." It is submitted that, similarly, the Commerce Clause will not tolerate a state law which would render nugatory a broad national policy by mechanistic application of local economic concepts related to illegality of purpose and means without realistic regard to the methods and objectives actually present in both the economic and physical circumstances. Thus, this Court was unwilling to question, in the name of the Fourteenth Amendment, the Missouri policy of applying its antitrust laws in the field of labor disputes. *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490. But when that policy was further extended so as to reach labor relations which affect commerce, this Court did not hesitate to express its disapproval. *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468.

Finally, under this head, it is important to note that the activities in this field were all in commerce itself, not merely in a local industry affecting commerce. This fact

should be significant in determining the extent to which a state may exercise its police power. While, as noted above, the power of the states to legislate for public safety is extremely broad, there are limitations upon even state power to legislate in the name of public safety. See, e.g., *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761. The limitations are even narrower upon state power to regulate interstate transportation for economic or social reasons. *Buck* v. *Kuykendall*, 267 U.S. 307; *Morgan* v. *Virginia*, 328 U.S. 373. Without raising the question (which would be beyond the scope of the writ of certiorari) whether, in the absence of an Act of Congress, the state court could have issued its injunction in this case, it is submitted that the Court should more readily determine that the Taft-Hartley Act has excluded state action whose impact is felt directly by commerce, than it would where the initial impact is in a field less completely subject to Congressional control.

## II. Any Complaint Which Was or Might Have Been Made of the Petitioners' Activities Was Actually or Colorably Within the Jurisdiction of the National Labor Relations Board, so as to Deprive the State Court of Jurisdiction.

There is another reason why the State Court was without jurisdiction so that its decree should be reversed. Without conceding that any of their acts were illegal, the petitioners point out that the case sought to be made out against them was a case of one or more unfair labor practices denounced by the Labor Management Relations Act. The Railroad, in its successive bills of complaint, set forth at least three unfair labor practices as the gravamen of its complaint, and, during the trial it placed in the record evidence calculated to portray the petitioners' activity as

another such practice. It is submitted that, if the petitioners were to be put on trial for such practices, the only proper tribunal to hear and decide the case was the National Labor Relations Board. *Garner* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468.

1. The Railroad's original bill of complaint alleged (R. pp. 3, 4, Par. 17a, b, d) the ingredients of an unfair labor practice under Section 8(b)(4)(A) without explicitly characterizing them as such. That the gist of the complaint was an alleged violation of this section was made more clear in the substitute bill (R. p. 13, Pars. 9, 10, 11, and R. p. 15, Par. 14c). Any possible doubts on this point were resolved by the recitals in the motion to amend the substitute bill and in the amended substitute bill (the bill upon which the final decree was rendered).

The motion to amend (R. p. 175) contained the following recital:

> "This request is made because on December 19, 1952, a decision of the United States National Labor Relations Board in *In re Washington-Oregon Shingle Weavers District Council, et al.*, Case No. 19-CC-42, 101 NLRB No. 203 (Marysville, Wash.) made available to the petitioner a remedy under Section 8(b)(4)(A) of the National Labor Relations Act for the harm suffered by the petitioner from the facts giving rise to this cause of action.
>
> "In order to obtain this remedy (which this Court concurrently with District Courts of the United States has jurisdiction to afford) the petitioner must replead its case in accordance with request herein made."

The amended substitute bill of complaint (R. p. 176) repeated the cited paragraphs of the substitute bill, and went on to allege (R. p. 180, par. 12d):

"The said acts were intended to and did, in fact, result in an unlawful secondary boycott in violation of the laws of the Commonwealth of Massachusetts, *and of Section 8(b)(4)(A) of the National Labor Relations Act.*" (Emphasis supplied).

2. In addition to the allegations of secondary boycott, the Railroad's substitute bill and its amended substitute bill set forth, as an additional basis of liability, an allegation of an unfair labor practice under Section 8(b)(4)(D) of the Act, this time specifically characterizing it as such. The substitute bill (R. p. 14, par. 12c, see also the same language in the amended substitute bill, R. p. 180, par. 12c) alleges:

"The said acts were and are intended to compel shippers and motor truck carriers to assign work to members of the respondent union and to thereby commit an unfair labor practice *in violation of the National Labor Relations Act.*" (Emphasis supplied.)

3. A third unfair labor practice imputed by the pleadings to the petitioners was a violation of Section 8(b)(1)(A). The substitute bill (R. p. 12, par. 8a, see also the same language in the amended substitute bill, R. p. 178, par. 8a) alleged:

"The petitioner is informed and believes that on July 11 and July 12, 1952, in or about the premises and in the vicinity of the No. 5 Yard, each of the individual respondents and the respondent union coerced, ordered and directed drivers of tractors hauling trailers for transportation via flat car service to refuse to permit the trailers to be loaded upon petitioner's flat cars."

That the purpose of this language in the substitute bill and the amended substitute bill was to place the petitioners' conduct within the proscription of Section 8(b)(4)(A) is made clear by comparing it with that of paragraph 13 of the original bill of complaint (R. p. 3). There it is alleged that coercion was directed by the petitioners against "various motor carriers and shippers of freight" to divert trailers from the railroad. The substitute allegation that coercion was directed against the drivers, rather than against the carriers who employed them, was manifestly designed to make the bill give expression to the pleader's theory that a Taft-Hartley unfair labor practice is a local tort.

4. Finally, the record indicates the existence of a colorable violation of Section 8(b)(3) of the Act. The Union has collective bargaining agreements with motor carriers in the Boston area. (R. p. 120). While such contracts were being negotiated in 1946 and 1949, the Union demanded a clause prohibiting movement by rail flat car while employers have available equipment of their own, but such a clause was never included in a Union-motor carrier contract, including the contract of 1951, which was in effect at the time of the acts complained of. (R. pp. 125, 126). There was no showing that, prior to the work stoppage in question, the Union had served notices pursuant to Section 8(d) of the Act.

The respondent vigorously protests (brief in opposition to petition for writ of certiorari, pp. 11-13), and will undoubtedly continue to do so, that the petitioners' activity did not constitute a Section 8(b)(4)(A) secondary boycott. That may be true, but it does not detract from the fact that the petitioners' activity was presented to the Court below as a Taft-Hartley secondary boycott and other practices within the proscription of Section 8(b). It is perhaps not without significance that this suit was com-

menced in July, 1952 and the trial was completed in March, 1953, long before December 14, 1953, when this Court handed down its decision in *Garner* v. *Teamsters Union*, 346 U.S. 485.

The crucial issue here is, not whether there was or was not a Taft-Hartley secondary boycott or other unfair labor practice, but, as this Court put it in *Garner* (346 U.S. at 489):

> "It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. But it is clear that the Board was vested with power to entertain petitioner's grievance, to issue its own complaint against respondents and, pending final hearing, to seek from the United States District Court an injunction to prevent irreparable injury to petitioners while their case was being considered. [Footnote omitted]. The question then is whether the State, through its courts, may adjudge the same controversy and extend its own form of relief."

Adjudication of questions as to the four unfair-labor-practice provisions adverted to above, in the context of this case, is a matter peculiarly within the competence of the National Labor Relations Board, the designated and authorized supervisor of the National policy set forth in the Act.

*First.* Section 8(b)(4)(A) is the vehicle by which Congress has expressed its will with respect to "secondary boycotts." See, *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 686. This vehicle is not, however, a detailed code of specific prohibitions. Rather,

it is a declaration of economic policy, cast in general terms which can be given concrete meaning only by a process of case-by-case adjudication. So far as it may be relevant here, the Section forbids a labor organization to strike or induce a strike or concerted refusal by employees to handle any articles or perform any service where an object thereof is to require any employer or other person to cease doing business with any other person. The filing of a charge under the Section would, on the facts of this case, raise a number of difficult problems of statutory interpretation.

At the outset one would be met with the questions whether "an object" of the picketing was to compel any person "to cease doing business" with "any other person." Was the relation between New England Transportation Company and the motor carriers one of "doing business?" How characterize, in this setting, the course of dealing between the Railroad and its subsidiary, New England? The statutory phrase "to cease doing business" may seem to the lay mind the expression of a very simple idea, but experience has shown that it lacks rigid clarity. *Douds* v. *Metropolitan Federation of Architects, etc.*, 75 F. Supp. 672 (S.D.N.Y., 1948). And see *Royal Typewriter Co.*, 111 NLRB No. 57, 35 LRRM 1474.

Again, whether the Railroad would come within the term, "employer," or "any other person" as used in Section 8(b)(4)(A), or within neither or both of these terms is a question which must be addressed primarily to the *expertise* of the National Board. The problem here is not essentially different from that posed in *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 191, where this Court pointed out that interpretation of the word "employee", as used in Section 10(c), was a problem for the Board, in the setting of the particular case, having in mind the over all purposes of the Act as a whole. In a case such as this, the process of interpretation is one of arriving at a delicate adjustment of a complex of

public interest factors under the code of industrial relations which the Congress has established in the Labor Management Relations Act and the Railway Labor Act as well. Resolution of a problem so directly affecting nationally protected public rights cannot be had by a local balancing of private rights, even where the claimant relies upon a not unusual regulatory policy found in the statute book of a particular state. *Garner* v. *Teamsters Union*, 346 U.S. 485, 498; *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468, 479. And see, *General Drivers, etc.*, v. *American Tobacco Co.*, 348 U.S. 978, reversing 264 S.W. 2d. 250.

Finally, under this head, one would find the question, who was boycotting whom? Was the Union's activity directed against the Railroad through New England, or was whatever loss the Railroad incurred a secondary consequence of primary activity directed against the motor carriers? The facts here show concerted action, quite unlike the single isolated incident which this Court appraised in *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665. But both this Court and the Board have pointed out that application of Section 8(b)(4)(A) calls for a delicate judgment as to whether the activity involved is essentially primary or secondary in character. *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675; *Electrical Workers* v. *NLRB*, 341 U.S. 694; *Carpenters Union* v. *NLRB*, 341 U.S. 707; *NLRB* v. *International Rice Milling Co.*, supra; *Thurston Motor Lines, Inc.*, 110 NLRB No. 122, 35 LRRM 1112; *Brewery & Beverage Drivers, etc., and Washington Coca-Cola Bottling Works*, 107 NLRB 104; *In the Matter of Sailors Union of the Pacific and Moore Dry Dock Co.*, 92 NLRB 547; *In the Matter of International Brotherhood of Teamsters, etc., and Sterling Beverages, Inc.*, 90 NLRB 401. Compare, *Washington-Oregon Shingle Weavers District Council*, 101 NLRB 1159; *NLRB* v. *Washington-Oregon Shingle Weavers District Council*, 211 F.2d 149.

In a very real sense, this case amounts to much more than a lawsuit between the New Haven Railroad and a single local union. The railroad practice of "piggy-backing" is constantly expanding. From a rudimentary, and perhaps freakish beginning of hauling loaded produce wagons short distances a century ago, it is developing, in this decade of the twentieth century, into a substantial segment of the transportation industry. See *Movement of Highway Trailers by Rail*, 293 ICC 93. As additional railroads adopt this practice and develop additional routes, increasing pressures will be brought upon motor carriers to "sell" them this method of transportation as a substitute for over-the-road hauling. Wherever "piggy-back" terminals service an area, the truck drivers will be exposed to competition for their jobs. If, in bringing counter-pressures against the employer motor carriers to retain their jobs, they are subject to limitations growing out of Section 8(b)(4)(A), it is of the highest importance that the nature and content of such limitations be defined by the single standard administered by a single agency. It was hardly the intention of Congress that the bargaining rights of truck drivers for their jobs should have one scope in Boston, another in Chicago, and a third in Philadelphia. Congress has undertaken to regulate the bargaining relationship between drivers and motor carriers, and has entrusted superintendence of that status to the National Board. There has been left no room for parallel or dissident local regulation. See, *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468, 479.

*Second.* Section 8(b)(4)(D) prohibits work stoppages with the objective of "forcing or requiring any employer to assign particular work to employees in a particular labor organization * * * rather than to employees in another labor organization or in another trade, craft or class * * *." A charge under this section would raise problems no less difficult than those which would be raised by a charge under

Section 8(b)(4)(A). Was this a case of "assignment" of work? If so, was it "particular work" within the meaning of the statute? Was there pressure for work assignments which would be discriminatory against New England employees in favor of other members of the Union? If so, would it fall within the prohibition of the Section? Would employees of the Railroad be employees "in another labor organization" within the meaning of the Act? If so would they be deprived of assignment of "particular work?" These questions, like those potentially arising under Section 8(b)(4)(A), call for processes of interpretation calculated to achieve the purposes of the Act considered as a whole, and again, in the nature of things, they should be resolved on a national, not a local level. That the area encompassed by Section 8(b)(4)(D) has been federally pre-empted is underscored by the fact that Congress has seen fit to make special procedural provisions provisions governing Board action in cases of charges based upon this section. See Section 10(k) of the Act.

*Third*, A similar jurisdictional conflict is suggested by the Railroad's allegations based upon Section 8(b)(1)(A). It is, of course, true that this Court has ruled that this section does not preclude a local common-law damage action where the coercive tactics directed against employees are part of a pattern of violent organizational effort. *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656. But this Court has also permitted state action by way of administrative *restraint* where the tactics were, although apparently free of physical violence, harassingly coercive and, in the particular circumstances, unrelated to bargaining objectives. *International Union* v. *Wisconsin Board*, 336 U.S. 245. In *Laburnum*, this Court, by its grant of limited certiorari, clearly pointed out that it was dealing with a special situation, not generally with the question of

jurisdiction of conduct which is prescribed by Section 8(b)(1)(A):

> "*In view of the type of conduct found by the Supreme Court of Appeals of Virginia to have been carried out by Petitioners*, does the National Labor Relations Board have exclusive jurisdiction over the subject matter so as to preclude the State Court from hearing and determining the issues in a common-law tort action based upon this conduct?" 346 N.S. 936. (Emphasis supplied).

In its opinion on the merits, the Court took pains to say, "We are concerned only with the above-stated jurisdictional question." 347 U.S. 656, 659.

The record here shows no pattern of conduct on the part of the petitioners even remotely comparable with that in *Laburnum*. Yet the allegations in the pleadings (which were not borne out by the evidence under any conceivable theory) potentially contained nice questions of statutory interpretation impinging upon an important area in the field of industrial relations regulated, in part, by Section 8(b)(1)(A). The allegations would call upon the trier of the case to make a distinction between restraint or coercion, on the one hand, and persuasion or union discipline, on the other. Thus, again, on its face the bill of complaint is one which commended itself to the attention of the Labor Board, not that of a state court.

*Fourth.* An examination of the record in its relation to Section 8(b)(3) and 8(d) of the Act further points up the State Court's lack of jurisdiction. Section 8(b)(3) would impose upon the Union the obligation to bargain collectively with employers of employees whom it represents. That term is defined in Section 8(d), which imposes limitations upon the parties to an agreement with respect to modification

and termination. The record indicates that the petitioner Union's contracts with motor carriers contained no express restrictions on the latters' use of the respondent's "piggy-back" service. It also indicates, at least inferentially[6] that this had been the subject of a bargaining proposal in the negotiation of the agreement.

In circumstances like this, Board policy has varied and is none too clear. Compare *Allied Mills, Inc.*, 82 NLRB 854, and *Tide Water Associated Oil Co.*, 85 NLRB 1096, with *Jacobs Manufacturing Co.*, 94 NLRB 1214. In *Jacobs*, a majority of the Board members concurred in the result that a matter which was consciously explored during collective bargaining negotiations was not a mandatory subject of bargaining during the contract period. Not all of the majority members agreed on the reasons for this conclusion, and the Second Circuit, in reviewing the decision of the Board, expressly disclaimed a ruling "upon the effect, if any, on the duty to bargain, of mere previous discussion of a subject without putting any terms and conditions as to it into the contract." *NLRB* v. *Jacobs Manufacturing Co.*, 196 F.2d 680,

Furthermore, although some Board members felt, in *Jacobs*, that, "The portion of Section 8(d) we are here considering does no more than provide a defense to a charge of a refusal to bargain under Section 8(a)(5) or 8(b)(3) of the Act. It does not render unlawful economic action aimed at securing lawful objectives", subsequent judicial decisions have raised serious question as to the right to strike in circumstances such as these described. The Eighth Circuit has read the provisions of the Section 8(d) definition of collec-

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[6] The actual evidence is that negotiations as to "piggy-backing" were had prior to the union-carrier contracts in 1946 and 1949. There is no express evidence as to the negotiations for the 1951 contract, but the impression is left that they were similar to those in 1946 and 1949. (R. p. 126).

tive bargaining as literally precluding a work stoppage during the contract period. *Local No. 3, Packinghouse Workers v. NLRB*, 210 F.2d. 325; *Lion Oil Co. v. NLRB*, 221 F.2d. 231.

The logical implication of a doctrine such as that announced in the latter two cases is that a work stoppage for an objective bargained for but not provided for in a contract, during the period of a contract is an unfair labor practice under Section 8(b)(3). If this be so, certainly cases arising on complaints of such conduct must be brought before the Board. Industrial stability is certainly not to be achieved by allowing individual state courts to rule, as matters of law, or juries to find, as matters of fact, what amounts to "conscious exploration" of a topic that was mentioned at a bargaining conference.

*Fifth.* Even if adjudication of the case were within the competence of the State Court, it will be noted that the record is completely wanting in data necessary to make a decision on any of the points heretofore discussed so as to interpret and apply the Act for the effectuation of the national policy which it declares. There is no showing as to the extent and relative importance of "piggy-backing" in the railroad industry, nor as to how much impact it is likely to have upon employment in the trucking industry. There is nothing in the record as to the motivations of motor carriers in using rail rather than over-the-road transportation, as to whether they find it economically advantageous or use it as a form of pressure in labor relations. There is nothing, beyond a vague reference to tariff schedules (R. p. 270) to indicate in any detail the nature of the carriage arrangements between the Railroad and motor carriers. There is not even a showing of the part played by New England Transportation Co. in the "piggy-back" operation, except the evidence that its employees place trailers on flat cars.

In a word, the record here contained only such data as

would have enabled the Court below to decide the case if there were no relevant federal statute on the books. It is a record designed to enable a tribunal to choose between two conflicting claims of private right. It is considerably less than the sort of record which would be presented by a General Counsel of the National Labor Relations Board, intent on convincing the Board that the national public policy envisioned by Congress lies on one side or the other of the dispute.

III. The Jurisdiction of the Board is not Affected by the Fact That Respondent is a Rail Carrier.

The Supreme Judicial Court which, unlike the Superior Court, heard and decided this case after the decision in *Garner* v. *Teamsters Union*, 346 U.S. 485, was announced, recognized (R. pp. 307, 308) the impropriety of restraining a Taft-Hartley unfair labor practice as such. It said, however (R. p. 308):

> "We are not, however, prepared to agree with the union that the only means open to the railroad to secure injunctive relief was through a charge filed by the railroad with the national labor relations board and by subsequent proceedings by the board."

The Court went on (R. p. 309) to express its "doubt that the railroad could obtain a remedy by filing a charge under L.M.R.A." From this point it concluded, on the unexpressed assumption that state law was applicable, and without exploring the Union's claim of a Taft-Hartley Section 7 right, that the petitioners had engaged in a Massachusetts secondary boycott, and so it affirmed the decree of the trial court.

The pertinence of the Court's assertion that the Railroad

could not find a remedy with the Board is doubtful, if the petitioners' conduct is within the protection of Section 7 or if it is within the pre-empted area covered by Section 8(b). The soundness of the assertion is even more doubtful.

The Court's assertion is based upon the premise that the Board will not receive charges filed by an employer subject, as is the respondent, to the Railway Labor Act. This extraordinary premise is said to be established by a number of Board decisions applying the definitions of "person" and "employer" contained in Sections 2(1) and 2(2) of the Act. *None of the Board decisions stands for any such proposition as that advanced by the Court. In fact, none of them involved the filing of charges by a rail carrier, and no Board case has been found in which the Board found jurisdictional or other objections to the filing of charges by a rail carrier.*

*International Rice Milling Co., Inc.*, 84 NLRB 360, cited by the Court (R. p. 308) was a case where the complaint was issued on charges filed by the Milling Company, not by a railroad. It involved, not the procedural question of standing to file charges, but the substantive issue whether the inducing of a work stoppage by employees of a rail carrier which stood in a secondary position constituted a violation of Section 8(b)(4)(A). The Board answered that question in the negative, on the ground that the rail carrier was not "another employer" within the meaning of Section 8(b)(4)(A) because rail carriers were expressly excluded from the definition of "employer" in Section 2(2). Thus, this part of the Board's decision, even if it had been allowed to stand,[7] would in no way be inconsistent with

[7] The Court of Appeals reversed, interpreting "employer" in Section 8(b)(4)(A) as including railroads, even though they were expressly excluded from the definition of that word for other purposes. 183 F.2d 21. This question in the case was not reviewed by this Court in 341 U.S. 665.

Board recognition of a rail carrier's standing to file charges.

The Act contains no provision as to who may file charges. The Board must have charges before it in order to issue a complaint, but the statutory reference to charges is in the passive voice: "whenever it is charged * * * ." (Section 10(b)). The Rules and Regulations of the Board (29 C.F.R., Supp. 102.9, 16 F.R. 1937, March 1, 1951) provide:

> "A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person * * * ."

The Regulations go on to provide that terms used therein, including "person" shall have the meaning given them by Section 2 of the Act.

Section 2(1) of the Act defines "person" as follows:

> "The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

Thus, on a literal reading of the Board regulations, the Railroad, as a corporation, is a "person" qualified to file a charge of any unfair labor practice. The Board has not decided that its regulations, in this respect, are subject to anything other than a literal reading.

Cases like *Sprys Electric Co.*, 104 NLRB 1128, and its leading predecessor, *Al J. Schneider Co., Inc.*, 87 NLRB 99, relied upon (R. p. 309) by the Court below, are not in point. In the first place, what the Board was passing upon in these cases was the question whether there had been a substantive violation of Section 8(b)(4)(A), not the procedural question of standing to file a charge. In the second place, the cases involved the United States and a political subdivision

of a State. These, like a railroad, are excluded from the statutory definition of "employer" by the express language of Section 2(2), but, unlike railroads ("corporations") they are not included within the definition of "person" in Section 2(1).

As the Court below noted (R. p. 309) the Board, in *International Rice Milling Co., Inc.* acceded to the ruling of the Court of Appeals in that case that a railroad was an "employer" for purposes of Section 8(b)(4)(A) by entering a supplemental order. 95 NLRB 1420. But even if, as the Court intimates (R. p. 309) the Board would not follow that rule in another case involving a railroad, such a Board attitude would not be dispositive of a case like the present. If an 8(b)(4)(A) violation is to be found here, it must be, not on the theory that the Railroad is an employer, for there was no inducement of Railroad employees to strike or take other concerted action, but on the theory that the Railroad was "any other person," within the meaning of the Section.

The fact of the matter is that there is no apparent disposition of the Board to resist the Court of Appeals ruling in *International Rice Milling Co., Inc.* v. *NLRB*, 183 F.2d. 21, that a railroad is an "employer" for purposes of Section 8(b)(4)(A). On the contrary, although the point has not been definitely settled, there is now a disposition, expressed by at least one member of the Board, to go beyond the ruling of the Court of Appeals and to hold that even the United States, States and their political subdivisions are both "employers" and "persons" for purposes of Section 8(b)(4)(A), thus overruling *Sprys Electric Co., Inc.*, 104 NLRB 1128, and its progenitors. See, *Pasco-Kennewick Building Trades Council*, 111 NLRB No. 192, 35 LRRM 1667.

Furthermore, debate and discussion as to whether the Railroad is an "employer" or a "person" for purposes of Section 8(b)(4)(A) would seem highly irrelevant to the question of the Railroad's status to seek administrative

relief as a claimed beneficiary of the public right proclaimed by the other provisions of Section 8(b) which the petitioners' activity is asserted to have violated.

This case is unlike cases where the activity in question was not governed by the national law in that the Board "is without express power to prevent it." *Garner* v. *Teamsters Union*, 346 U.S. 485, 488. See, *International Union* v. *Wisconsin Board*, 336 U.S. 245; *Algoma Plywood Co.* v. *Wisconsin Board*, 336 U.S. 301. Here, the Board could have taken jurisdiction upon the filing of charges by any of the motor carriers, including the Railroad's subsidiary, New England. It would be unthinkable that jurisdiction of activity clearly within its jurisdiction could be wrested from the Board simply by selection of a complaining party.

In any event, even if the Railroad (assuming its allegations to be well founded) should be unable to obtain a remedial order from the Board, whether for want of qualification to file charges or for any one of a number of other reasons which might be listed, it would not follow that the State Court acquires jurisdiction of the case. This Court has emphatically recognized that a failure or refusal of the National Labor Relations Board to act, in a matter within its jurisdiction, may be an integral part of the national scheme which precludes state regulation. *Bethlehem Steel Co.* v. *New York Board*, 330 U.S. 767. As part of this doctrine this Court has required as a minimum that an application to the Board be made where the matter involved is potentially within its jurisdiction. *Building Trades Council* v. *Kinard Construction Co.*, 346 U.S. 933. Since the Railroad admittedly did not file charges with the Board, and since, as has been pointed out there is no "clear showing" that it "would be futile to do so," this case falls clearly within the doctrine of *Kinard*.

IV. The Question of the Damages Portion of the Decree.

In addition to issuing an injunction, the Court below ordered payment of damages. (R. p. 318). It is submitted that this portion of the decree is as invalid as the injunctive paragraph.

As has been pointed out, this case is in no way comparable with *United Construction Workers v. Laburnum Construction Co.*, 347 U.S. 656, where this Court affirmed a money judgment by a state court based upon conduct which came within the description of an unfair labor practice defined by Section 8(b)(1)(A) of the federal Act. The decision there was clearly not an *open sesame* to state courts to accomplish by money judgments what they were forbidden to do by their injunctive processes. *Laburnum*, as indicated by the order granting certiorari (346 U.S. 936) and by the express recital in the opinion (347 U.S. at 659), was limited to the peculiar factual situation there found. The doctrine there established was made applicable to a situation involving, in the words of Senator Taft cited by the Court (347 U.S. at 668) "a threat of violence constituting violation of the law of the State."

Here, it has been expressly found (R. p. 306) that the petitioners' "conduct at no time was disorderly or other than peaceful."

In *Laburnum*, the conduct was tortious by any standard, involving as it did, actual and threatened violent breaches of the peace. Here, to say that the State Court had jurisdiction to award damages for tortious conduct would be to beg the question. If the tortious or privileged character of the petitioners' conduct is to be determined under national law by a national tribunal, it follows that a state court can no more award damages under state law than it can enjoin under that law.

Finally, the National Board, if it had jurisdiction of the activity complained of in this case, was not impotent to

provide an adequate remedy. It had full power, in the event of issuance of a complaint and a finding against the petitioners, to issue whatever order might be appropriate in the circumstances. Section 10(c). In addition, upon issuance of a complaint, the Board could obtain injunctive relief from the United States District Court (Section 10(j)) and, in cases of charges under Sections 8(b)(4)(A) and 8(b)(4)(D) the regional director or regional attorney shall, upon a finding of probable cause, apply to the United States District Court for injunction or temporary restraining order.

It is submitted that, in the circumstances of this case, the Railroad would have been adequately protected by the procedures of, and available to the Board, until an authoritative determination had been made, by a competent tribunal, of the lawful or unlawful character of the petitioners' conduct. Not until such a determination is so made should the Railroad be permitted to seek damages.

## Conclusion

For the foregoing reasons it is respectfully requested that this Court reverse the decree of the Massachusetts Superior Court and remand with directions to vacate the decree and dismiss the respondent's bill of complaint.

Respectfully submitted,

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## Appendix

The pertinent provisions of the Constitution of the United States are as follows:

"ARTICLE I.

"Section 8. The Congress shall have power * * *

"To regulate Commerce with foreign nations, and among the several states and with the Indian Tribes;

* * *

ARTICLE VI.

"The Constitution, and Laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

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The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C., 141, et seq.), are as follows:

"DEFINITIONS

"Sec. 2. When used in this Act—

"(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Re-

serve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * *

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * *

"UNFAIR LABOR PRACTICES

"SEC. 8. * * *

* * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

* * *

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

*Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * *

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period; if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in

which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C). . . .

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee,

back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * *

"(j) The Board shall have power, upon issuance of

a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

"(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

"(l) Whenever it is charged that any person has engaged in an unfair labor practice, within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is

true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, not withstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the pro-

cedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).

* * *

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The relevant provisions of H. R. 3020, as it passed in House, 80th Cong., 1st Sess. are as follows:

"DEFINITIONS

"SEC. 2. When used in this Act—

* * * *

"(11) The terms 'bargain collectively' and 'collective bargaining' as applied to any disputes between an employer and his employees or their representative mean compliance with the following minimum requirements:

* * *

Such terms shall not be construed as requiring that either party reach an agreement with the other, accept any proposal or counterproposal either in whole or in part, submit counterproposals, discuss modification of an agreement during its terms except pursuant to the express provisions thereof, or discuss any subject matter other than the following: (i) Wage rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects.

* * *

"(14) The term 'illegal boycott' means a concerted refusal, or threat of a concerted refusal, by individuals in the course of their employment—

* * *

"(C) to use, install, handle, transport, or otherwise deal with particular articles, materials, or commodities by reason of the origin or proposed destination thereof, or by reason of the character of a prior or proposed future handling thereof, or by reason of the policies or practices of any person (not their employer) having any direct or indirect relationship thereto.

* * *

"RIGHTS OF EMPLOYEES

"SEC. 7 (a) Employees shall have the right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities (not constituting unfair labor practices under section 8 (b), unlawful concerted activities under section 12, or violations of collective-bargaining agreements) for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities: Provided, That nothing herein shall preclude an employer from making and carrying out an agreement with a labor organization as authorized in section 8 (d) (4).

* * *

"UNFAIR LABOR PRACTICES

"SEC. 8. * * *

* * *

"(b) It shall be an unfair labor practice for an employee, or for a representative or any officer of a representative, or for any individual acting for or under the direction of a representative, or for or under the direction of any officer thereof—

* * *

"(3) to call, authorize, engage in, or assist any strike or other concerted interference with an employer's operations, an object of which is to compel the employer to accede to the inclusion in a collective-bargaining agreement of any provision which under section 2 (11) is not included as a proper subject matter of collective bargaining.

* * * *

"UNLAWFUL CONCERTED ACTIVITIES

"SEC. 12. (a) The following activities, when affecting commerce, shall be unlawful concerted activities:

* * *

"(3) Calling, authorizing, engaging in, or assisting—

"(A) any sympathy strike, jurisdictional strike, monopolistic strike, or illegal boycott, or any sit-down strike or other concerted interference with any employer's operations conducted by remaining on the employer's premises:

* * *

"(b) Any person injured in his business, person, or property by any unlawful concerted activity affecting commerce may sue the person or persons responsible therefor in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, and may recover the damages sustained by him as a result of such unlawful concerted activity, together with the costs of the suit, including a reasonable attorney's fee.

"(c) No provision of the Act of March 23, 1932, entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', shall have any application in any action or proceeding in a court of the

United States involving any activity defined in this section as unlawful.

"(d) A person who is found to have engaged in any activity herein defined as an unlawful concerted activity shall be subject to deprivation of rights under this Act to the same extent as a person found to have engaged in an unfair labor practice under section 8 (b) or 8 (c).

"(e) Except as specifically provided in this section, nothing in this Act shall be construed to diminish the right of employees to strike or to engage in other lawful concerted activities. No provision of this Act, and no order of any court issued hereunder, shall be construed to require any individual to perform labor or service without his consent.

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## TITLE III—MONOPOLISTIC PRACTICES OF LABOR ORGANIZATIONS; LIABILITY OF LABOR ORGANIZATIONS; MISCELLANEOUS PROVISIONS

### *Monopolistic Practices*

SEC. 301. (a) The second paragraph of section 20 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended, is amended by inserting before the period at the end thereof a colon and the following: "Provided, That nothing in this paragraph shall be construed in any proceeding, civil or criminal, under the antitrust laws to make lawful any combination, contract, or conspiracy in restraint of trade having as its purpose one or more of the objects which are defined in section 6 as not being legitimate objects of a labor organization".

(b) Section 6 of the Act entitled "An Act to supplement existing laws against unlawful restraints and

monopolies, and for other purposes", approved October 15, 1914, as amended, is amended by inserting before the period at the end thereof a colon and the following: "Provided, however, That it shall not be within the legitimate objects of labor organizations or the officers, representative, or members thereof, to make any contract, or to engage in any combination or conspiracy, in restraint of commerce, if one of the purposes or a necessary effect of such contract, combination, or conspiracy is to join or combine with any person to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions, upon the purchase, sale, or use of any product, material, machine, or equipment, or to engage in any concerted activity declared to be unlawful under section 12 of the National Labor Relations Act, as amended".

(c) In any proceeding involving a violation of the antitrust laws, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not have any application.

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